Immunocept, LLC, et al v. Fulbright & Jaworski Doc. 12

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

IMMUNOCEPT, LLC, PATRICE ANNE LEE, AND JAMES REESE MATSON	§	
	§	
Plaintiffs,	§	
v.	§	CAUSE NO. A050A334 SS
FULBRIGHT & JAWORSKI, LLP,	§	
Defendant.	§	

DEFENDANT'S MOTION FOR PROTECTIVE ORDER PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 26(C)

TO THE HONORABLE JUDGE OF THIS COURT:

COMES NOW, Fulbright & Jaworski, LLP ("Fulbright"), Defendant in the above-entitled and numbered cause, and files this Motion for Protective Order Pursuant to Federal Rule of Civil Procedure 26(c), and in support thereof would respectfully show the Court as follows:

I. INTRODUCTION

The Plaintiffs have sued Fulbright, claiming that Fulbright was negligent in prosecuting a patent on a process known as large-pore hemofiltration. In their Amended Complaint, the Plaintiffs allege that Fulbright committed "grossly negligent conduct."

Nonetheless, the Plaintiffs have sought discovery regarding Fulbright's net worth – information that would not be relevant unless Plaintiffs can raise some evidence of grossly negligent conduct. Plaintiffs, in *Plaintiffs' (Corrected) Second Request for Production of Documents*, seek "[a] document that reflects the net worth of Fulbright." **Exhibit A, no. 4.** Similarly, in the *Second Amended Notice of Intention to Take Oral Deposition and Subpoena*

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Duces Tecum of the Corporate Representative of Fulbright & Jaworski, LLP, the Plaintiffs ask Fulbright to designate a representative to testify regarding "[a]ll facts and the identity of all witnesses that have facts related to Fulbright's net worth." **Exhibit B, no. 7.**

Fulbright objects to this area of inquiry as calling for information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence. Until such time as the Plaintiffs can plead and make a *prima facie* case regarding conduct making possible the recovery of punitive damages, Fulbright respectfully asks that this Court issue an order that discovery regarding Fulbright's net worth shall not be had. Fulbright is agreeable to producing information relating to its net worth at an appropriate time.

II. ARGUMENT AND AUTHORITIES

Fulbright carefully maintains and guards its financial information regarding net worth. The disclosure of such confidential, proprietary, and private business and financial information would result in harm to Fulbright. Fulbright's financial statements and financial information are relevant in this lawsuit only upon a finding by a trier of fact that Plaintiff is entitled to the recovery of punitive damages. While the net worth may be discoverable to a claim of exemplary damages, the Texas Supreme Court has declined to "circumscribe . . . a trial judge's authority to consider on motion whether a party's discovery request involves unnecessary harassment or invasion of personal or property rights." *Lunsford v. Morris*, 746 S.W.2d 471, 473 (Tex. 1988); *see In re Jerry's Chevrolet-Buick, Inc.*, 977 S.W.2d 565 (1998) (Gonzalez, J., dissenting) (explaining that the Texas Supreme Court has "yet to address when and on what basis a party is entitled to discover [financial and net worth] information").

Federal Rule of Civil Procedure 26(c) confers broad discretion on this Court to decide when a protective order is appropriate and what degree of protection is required. *See Seattle*

Times Co. v. Rhinehart, 467 U.S. 20, 36 (1984). Such judicial discretion should be exercised with respect to financial information when, as here, the Plaintiffs have offered nothing more than the conclusory statement that gross negligence has been committed, without alleging any supporting facts.

Chenoweth v. Schaaf is instructive. 98 F.R.D. 587 (W.D. Pa. 1983). In *Chenoweth*, the plaintiff's complaint alleged negligence and then summarily declared that "the actions of the defendants hereinabove and hereinafter referred to were careless, reckless, wanton and grossly negligent and therefore, plaintiff seeks punitive damages." *Id.* at 589. The court did not permit discovery of information regarding the defendants' financial status, explaining:

> We . . . hold that from the face of the complaint, ***nothing other than statements, conclusive in nature, are included*** from which ***the Court is unable to say that there is a real possibility that punitive damages will be an issue***, sufficient to allow the information requested.

Id. at 589-90 (emphasis added); *see also John Does I-VI v. Yogi*, 110 F.R.D. 629, 633 (D. D.C. 1986) ("[T]he Court will extend limited protection to discovery concerning defendants' financial status. This discovery is relevant, but should not be revealed until necessary to prove up punitive damages.").

The Amended Complaint filed by the Plaintiffs in this case, like the *Chenoweth* complaint, does not allege sufficient facts to entitle the Plaintiffs to the discovery they seek, as it does not provide the Court with information suggesting there is "a real possibility that punitive damages will be an issue." The Plaintiffs allege no facts regarding any particular acts that Fulbright took that were negligent, much less grossly negligent. They point to no language in the patent that they claim resulted from the alleged negligence, and merely state that Fulbright's "conduct fell below the standard of care which would have been exercised by reasonable patent attorneys." Amended Complaint, ¶ 19. A few paragraphs later comes the brazen declaration that "the grossly negligent conduct described in this complaint entitles Plaintiffs to recover exemplary damages." But there is no "conduct" described in the Amended Complaint at all – the Plaintiffs just claim that the wording of the patent was "poorly done," with no further explanation. Without at least pleading adequate facts and then presenting some evidence regarding gross negligence, the Plaintiffs should not be entitled to rummage around in Fulbright's financial data.

Plaintiffs have no legitimate need for net worth information at this time, and the request is premature and unreasonable. Fulbright's motion for protective order should be granted.

III. CONCLUSION AND PRAYER

For the foregoing reasons, Fulbright respectfully requests this Court to issue an order protecting Fulbright from discovery requests relating to Fulbright's net worth by denying the requested discovery, pending *prima facie* proof from the Plaintiffs that they can make the showing necessary to recover exemplary damages.

Respectfully submitted,

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CERTIFICATE OF CONFERENCE

The undersigned hereby certifies that counsel for Defendant has in good faith conferred or with Plaintiffs' counsel in an effort to resolve the dispute without court action. This effort was unsuccessful.

David J. Beck w/perm.

David J. Beck

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing document was served as shown below on counsel of record on October 11, 2005.

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